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Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1404

PENNHURST STATE SCHOOL AND HOSPITAL, et al.,

Petitioners

v.

TERRI LEE HALDERMAN, et al.,

Respondents

BRIEF OF THE STATE OF CONNECTICUT AS AMICUS CURIAE IN SUPPORT OF THE GRANT OF CERTIORARI

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit appears at 612 F.2d 84.

The opinion and order of the United States District Court for the Eastern District of Pennsylvania both appear at 446 F.Supp. 1295.

CONSENT OF THE PARTIES

Consent of the parties is not required since this brief of the State of Connecticut as Amicus Curiae is sponsored by its Attorney General. U.S. Sup. Ct. R. 42.

INTEREST OF AMICUS CURIAE

The State of Connecticut, as *parens patriae*, renders necessary services to its retarded citizens. A wide variety of services are offered, including evaluation and testing, counseling, respite care, special school districts, group homes, regional centers and state schools for the retarded. The demand for such services, however, exceeds the available resources, so that there are waiting lists for some of the services that are provided.

The court below broke new ground in federal-state relations concerning the care of the retarded in at least two respects:

1) By ruling that the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §6000, *et seq.* (hereinafter the "DD Act" or the "Act"), requires the states to render services to all of its developmentally disabled citizens, and

2) By requiring the services to be rendered in the least restrictive environment.

If the decision of the court below is affirmed, or followed by the remaining Circuits, the states will be required to provide services, regardless of cost, to all its developmentally disabled citizenry and in the manner that is mandated by the federal judiciary.

Connecticut, like all of the fifty states, participates in the DD Act program, receiving federal funds under the Act to render services in accordance with its state plan, which has been approved by the Department of Health, Education and Welfare (HEW). Only approximately Three Hundred Ninety-eight Thousand ($398,000) Dollars in federal monies was received under the Act for the fiscal year ended September 30, 1979. All of the monies received under the Act are utilized to provide community based services.[1]

STATEMENT OF THE CASE

This is a class action lawsuit, brought on behalf of all current and future residents of the Pennhurst State School and Hospital, alleging that the facility is operated in a manner that violates its mentally retarded residents' constitutional and statutory rights.

After an extensive trial, the District Court (Broderick, J.) found that the facility violated its residents' constitutional rights to "habilitation", *Halderman v. Pennhurst State School and Hospital*, 446 F.Supp. 1295, 1314, 1321 (E.D. Pa. 1977), as well as their statutory right to "nondiscriminatory habilitation" under Section 504 of the Rehabilitation Act, 29

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[1]The District Court in *Halderman* made no findings as to the DD Act. The Supplemental Memorandum of the Commonwealth of Pennsylvania before the Third Circuit Court of Appeals, dated August 15, 1979, p. 1-7, however, indicates that no DD Act funds are utilized at Pennhurst

U.S.C. §794. *id* at 1323. Rather than ordering that the facility be improved, the District Court ordered that the facility be closed and a master was appointed to supervise the transfer of residents into the community. *id* at 1325.

On appeal, the Third Circuit Court of Appeals largely affirmed the relief ordered below, but relied on an entirely different legal approach than the District Court. *Halderman v. Pennhurst State School and Hospital*, 612 F.2d 84 (3rd Cir. 1979). The majority ruled that Congress was legislating to implement the Fourteenth Amendment when it passed the DD Act, *id.* at 98, and that the Act provided the developmentally disabled with a right to habilitation, *id* at 95, which must be provided in the setting that is least restrictive to personal liberty, *id* at 107.

REASONS FOR GRANTING THE WRIT

I. The Act Was Not Passed Pursuant To Congress' Power to Implement The Fourteenth Amendment.

As noted, *supra*, the Court below held that the DD Act was passed pursuant to Congressional power to implement the Fourteenth Amendment.[2] The Court's conclusion is implicitly

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[2]The only support that the Court below offered for their conclusion that Congress intended to legislate pursuant to the Fourteenth Amendment is the remarks of two Senators, neither Chairman of the Subcommittee that introduced to legislation, as to Senate Bill 462. 612 F.2d fn. 17 at 98. The Bill subsequently went to conference where the "rights" provided by Senate Bill 462 were compromised. See, House Rep. 94-58, 94th Cong., 1st Sess. p. 41, 42, *reprinted in* 2 [1975], U.S. Code Cong. and Ad. News 919, 961, 962.

Even the remarks of the two individual Senators do not support a finding that the DD Act was enacted pursuant to Congress' power to implement the Fourteenth Amendment. Senator Stafford's remark is that, "Title II was added to the bill to assist in the protection of rights guaranteed under our Constitution . . ." 121 Cong. Rec. 16516 (1975). Senator Javits remarked that the federal government had abrogated its responsibility toward the developmentally disabled, citing *Wyatt v. Stickney*, and then noted that, "Congress should reaffirm its belief in equal rights for all citizens . . . This bill of rights of

based on cases holding that civilly committed mental patients and retardates have a quid pro quo "right to treatment".[3] See for example, *Wyatt v. Stickney*, 325 F.Supp. 781, *enforced*, 334 F. Supp. 1341 (1971), *supplemented*, 344 F.Supp. 373, 344 F.Supp. 387 (M.D. Ala. 1972), *aff'd in part, rev'd in part, remanded in part, sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974); *Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1974), *vacated on other grounds and remanded*, 422 U.S. 563 (1975); *Gary W. v. Louisiana*, 437 F.Supp. 1209 (E.D. La. 1976).

This Court has not yet ruled on whether civilly committed patients have a right to treatment. In *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975), this Court narrowly ruled that, ". . . a State cannot constitutionally confine without more a non-dangerous individual who is capable of surviving safely in freedom . . .". The right to treatment theory, however has been sharply criticized. Speece, *Preserving the Right to Treatment: A Critical Assessment and Constructive Development of Constitutional Right to Treatment Theories*, 20 ARIZ. L. REV. 1 (1978); *O'Connor v. Donaldson*, *supra*, p. 2495-2500. (Burger, J.) (concurring opinion).

S.B. 462 represents this new direction, and begins this new reaffirmation." 121 Cong. Rec. 16519 (1975). "Assistance" or a "new reaffirmation" may indicate Congressional concern and a preference for deinstitutionalization, but hardly amounts to a federal mandate passed pursuant to the Fourteenth Amendment.

That conclusion is also inconsistent with the history of the Act, see House Rep. No. 94-58, *supra*, and the implementing HEW regulations which indicate that Act is a co-operative federal-state grant program.

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[3]Cases concerning the retarded have tended to blur the distinction between the civil committment of retardates and the voluntary rendition of necessary services at the request of the retardate, parent or legal guardian, and have assumed that any retardate in a state institution is there involuntarily. See, *Halderman v. Pennhurst*, 446 F.Supp. 1295, 1319 (1977); *Wyatt v. Stickney*, 344 F.Supp. 387, 390, fn. 5 (1972).

That approach universally puts the onus of the retardates' condition upon the states and is a questionable application of state action principles. See, *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978).

Whatever its merits, the Court below turned the "right to treatment" theory on its head by holding that the DD Act, passed pursuant to Congress' power to implement the Fourteenth Amendment, obligates the states to treat all of its developmentally disabled residents and to do so in a manner that is least restrictive to personal liberties. That construction is inconsistent with the right to treatment theory, which only requires treatment as the quid pro quo for a deprivation of liberty. There is no authority to support the proposition that the Fourteenth Amendment affirmatively obligates the states to render services to its citizens whether or not the state desires to render such services or is fiscally able to provide such services. Wherefore, the Court's conclusion that Congress intended to implement the Fourteenth Amendment is clearly erroneous.

II. The Act, As Construed By The Court Below, Impermissibly Interferes With Traditional State Functions.

The Court below recognized that a Tenth Amendment issue would be presented if a private cause of action was implied from a grant program. 612 F.2d at 98, 99. The issue was avoided by its holding that the DD Act was passed pursuant to Congress' power to implement the Fourteenth Amendment. In light of the discussion, *supra*, showing that the Act clearly was not passed pursuant to the Fourteenth Amendment, it is necessary to consider whether the Act, as construed by the Third Circuit, violates the Tenth Amendment to the United States Constitution.

National League of Cities v. Usery, 426 U.S. 833, 851 (1976), held that the Tenth Amendment bars the federal government from impermissibly interfering with traditional governmental functions of the States.

A determination of the constitutionality of the federal action requires a balancing of the federal interests against the degree of federal intrusion upon state autonomy. *Develop-*

ments in the Law-Zoning, 91 HARV. L. REV. 1427, 1613 fn. 159 (1978); *National League of Cities, supra*, p. 856 (Blackman, J.) (concurring opinion); *Elrod v. Burns*, 427 U.S. 347, 375 (1976) (dissenting opinion).

National League of Cities voided the 1974 Amendments to the Fair Labor Standards Act, which extended federal wage and hour requirements to the states. Subsequent lower court decisions have held other activities to be within the protected sphere of state sovereignty. *United States v. Best*, 573 F.2d 1095, 1102 (9th Cir. 1978) (licensing of drivers is a traditional state function); *N.L.R.B. v. Highview, Inc.*, 590 F.2d 174, 178 (5th Cir. 1979) (the care of the aged, sick and the indigent is a traditional state function); *Jordon v. Mills*, 473 F.Supp. 12 (E.D. Mich 1979) (operation of prisons is a traditional state function).

Clearly, care of the retarded has traditionally been reserved to the states in their role as *parens patriae*. *Parham v. J. R.*, U.S. , 99 S.Ct. 2493 (1979); *Addington v. Texas*, U.S. , 99 S.Ct. 1804 (1979); *McIntosh v. Dill*, 86 Okl. 1 (1922); *Johnson v. State*, 18 N.J. 422 (1955).

Just as clearly, the Act, as construed by the Court below, extensively interferes with the states' function by dictating who is to receive services (all of the developmentally disabled) and the manner by which the services are to be rendered (in the least restrictive manner).

Finally, the federal interest is clearly insubstantial when balanced against the extensive interference with traditional state functions. Specifically, only a small proportion, approximately one percent, of all funds available for the care of the developmentally disabled are provided under the Act. House Rep. No. 94-58, *supra*, p. 6, *reprinted in* 2 [1975] U.S. Code Cong. § Ad. News 919, 924. Given the limited funding available under the Act, the purpose of the program is to promote ". . .

effective planning by the states of their programs, initiation of new needed programs, and filling the gaps among existing efforts." *id.*

Wherefore, the Act, as construed by the Cout below, impermissibly interferes with traditional state functions in violation of the Tenth Amendment to the United States Constitution.

III. The Court Below Erred In Holding That A Private Cause Of Action Could Be Implied From The Act.

The Court below applied the four factor analysis of *Cort v. Ash*, 422 U.S. 66 (1975), and concluded that a private right of action was implied in the Act.

That conclusion is inconsistent with the comprehensive administrative procedures established by the Act. See generally, 42 U.S.C. §6063 and 42 U.S.C. §6068.

That conclusion is also inconsistent with the fact that the Act concerns a subject matter that has been "traditionally relegated to state law". *Cort v. Ash, supra*, p. 78. This Court has repeatedly been reluctant to involve the federal courts in administering state institutions or in making medical or psychiatric judgments. See *Bell v. Wolfish*, U.S. , 99 S.Ct. 1861 (1979); *Rizzo v. Goode*, 423 U.S. 362, 378- 380 (1976); *Secretary of Public Welfare of Pennsylvania v. Institutional Juveniles*, U.S. , 99 S.Ct. 2523 (1979); *Parham v. J.R., supra*.

Wherefore, the Third Circuit erred in implying a private cause of action since Congress has provided alternative methods of enforcing whatever rights might be provided by the Act, without involving the federal courts in making difficult medical judgments in an area that has traditionally been reserved to the states.

IV. The Act Does Not Provide The Developmentally Disabled With A Right To Treatment.

The difficult constitutional issues, discussed *supra*, are presented due to the construction of the Act by the Court below, holding that the Act entitles every developmentally disabled person to treatment which must be provided in the least restrictive manner. While the Bill of Rights section, 42 U.S.C. §6010, is ambiguous, the construction by the Court below is inconsistent with the history of the Act, the legislative history of the 1975 Amendments and implementing HEW regulations.

Federal involvement in the area commenced with the Mental Retardation Facilities and Mental Health Centers Construction Act of 1963, P.L. 88-164, 77 Stat. 282 (1963), which provided grants to the states for construction of mental retardation facilities. House Rep. No. 94-58, 94th Cong., 1st Sess. 2, 4, *reprinted in* 2 [1975] U.S. Code Cong. and Ad. News 919, 920, 922. The Act was substantially amended and renamed by the Developmental Disabilities Services and Facilities Construction Amendments, P.L. 91- 517, 84 Stat. 1316 (1970), which broadened the scope of the Act from the retarded to the developmentally disabled generally and which authorized formula grants to the states for planning, administration and services in addition to the previously authorized grants for construction. House Rep. No. 94-58, *supra*, p. 4, *reprinted in* 2 [1975] U.S. Code Cong. and Ad. News 919, 922. The Act was subsequently amended and renamed the Developmentally Disabled Assistance and Bill of Rights Act, P.L. 94-103, 89 Stat. 486 (1975) and further refined by the Developmental Disabilities Act Amendments of 1978, P.L. 95-602.

The Act provides grants to states electing to participate in the program. 42 U.S.C. §6063. Only a small percentage, approximately one percent, of all funds available from federal,

state and local sources for services to the developmentally disabled are provided under the Act. House Rep. No. 94-58, *supra*, p. 6, *reprinted in* 2 [1975] U.S. Code Cong. and Ad. News 919, 924; House Rep. No. 95-1188, 95th Cong., 2nd Sess., p. 51, *reprinted in* 6 [1978] U.S. Code Cong. and Ad. News 7355, 7359.

A state seeking funds under the Act must have a plan approved by the Secretary of Health, Education and Welfare, 42 U.S.C. §6063(a), based upon compliance with the conditions outlined in 42 U.S.C. §6063(b). The conditions of compliance are general with the participating states given broad administrative discretion within priorities established by Congress. 42 U.S.C. §6063 (b)(4)(B) (1979 Supp.).

Given the limited funding available under the Act, the purpose of the program is to promote "... effective planning by the states of their programs, initiation of new needed programs, and filling of gaps among existing efforts."[1] House Rep. No. 94-58, *supra*, p. 6, *reprinted in* 2 [1978] U.S. Code Cong. and Ad. News 919, 924. Accordingly, those conditions of participation relating to the rendition of services apply only to programs receiving funds under the Act. For example, "services furnished . . . *under the plan*" and facilities in which they are provided must meet regulatory standards prescribed by HEW. 42 U.S.C. §6063(b)(5)(A)(i), and buildings "*used in conjunction with the delivery of services assisted under the plan*" must meet the requirements of the Architectural Barriers Act of 1968. 42 U.S.C. §6063(b)(5)(A)(ii).

The Developmentally Disabled Assistance and Bill of Rights Act of 1975 added, for the first time, the "Bill of Rights" section, 42 U.S.C. §6010. Even these provisions, however, are

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[1]The purpose of the Act changed somewhat with the 1978 Amendments, discussed *infra*.

obligatory upon the states only to the extent that funds under the Act are utilized to provide the services at issue.

> "(C) The plan must contain . . . assurances . . . that the *human rights* of all persons with developmental disabilities . . . who are receiving treatment, services or habilitation *under programs assisted under this chapter will be protected consistent with section 6010* of this title (relating to the rights of the developmentaly disabled)." 42 U.S.C. §6063(b)(5)(C). (Emphasis added)

The Committee report compels the conclusion that the states' obligations are limited to assistance under the Act.

> "The intention of the conference committee is that the habilitaton plan be required only when the Federal assistance under this Act contributes a portion of the cost of the habilitation services to the developmentally disabled person. If, for example, the only Federal assistance received by a program is used solely to purchase a bus to transport developmentally disabled persons, then a written habilitation plan would not be required. If, on the other hand, a program to provide habilitation services to developmentally disabled individuals is supported in whole or in part by Federal funds under this Act, a written habilitation plan would be required for each program participant." House Rep. 94-58, *supra*, p. 43, *reprinted in* 2 [1975] U.S. Code Cong. and Ad. News 919, 963.

In addition, the agency charged with enforcement of the Act (HEW) has issued regulations requiring only that the state plans ensure that those who receive services under the Act be provided with their human rights and treated in accordance with an individual habilitation plan. 45 C.F.R.

§1386.1(b)(5)(vi), 45 C.F.R. §1386.1(b)(5)(x). The implementing regulations of HEW are entitled to deference. *New York Department of Social Services v. Dublino*, 413 U.S. 405(1973).

Finally, the construction of the Court below is inconsistent with the repeated provisions, discussed *supra*, that limit the states' obligations to those assisted under the Act. See especially 42 U.S.C. §6063(b)(5)(C) and 45 C.F.R. §1386.1(b)(vi). It is a well established rule of law that a statutory course of action may only be found upon a breach of a statutory duty. The Act nowhere places a duty upon the states to treat the disabled except for those requirements on state plans which relate to the treatment of those assisted under the Act. Since the Act limits the states' obligations, it just as easily follows that any "right" provided by 42 U.S.C. §6010 is enforceable against the federal government in this "co-operative" program of providing services to the handicapped.[5]

V. The Act Does Not Obligate The States To Render Services In The Least Restrictive Manner.

As noted, *supra*, the Court below held that the developmentally disabled have a "right to treatment" which is to be provided in the "least restrictive" manner. The source of the "right" to be treated in the least restrictive manner is 42 U.S.C. §6010(2) which provides that:

> "The treatment, services, and habilitation for a person with developmental disabilities *should be* designed to maximize the developmental potential of

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[5]Curiously, the Court below never mentions the limitations of 42 U.S.C. §6063(b)(5) and 45 C.F.R. §1386.1(b)(vi). Indeed at 612 F.2d 96, the Court notes that, "(m)ore over, the revised statute contains a section requiring states to conform their plans to the dictates of the Bill of Rights provision, Section 6010," but fails to note that the requirement is limited to assistance furnished under the Act.

> the person and *should be* provided in the setting that is least restrictive of the person's personal liberty." (emphasis added)

The language of the statute uses the precatory language, "should be", in describing the desired treatment setting. Such language is inconsistent with the Court's finding of a mandatory duty to provide services in a prescribed manner.

The legislative history to the 1975 Amendments is in accord with the Conference Report again using the precatory language "should be" in describing the desired treatment setting. House Rep. 94-58, *supra*, p. 42, *reprinted in* 2 [1975] U.S. Code Cong. and Ad. News 919, 961.

The 1975 amendments did encourage deinstitutionalization by requiring that specified percentages of the States' allotments be spent on eliminating inappropriate placement in institutions. P.L. 94-103, *formerly codified at* 42 U.S.C. §6062(a)(4). Again the legislative history of the Act clearly indicates that the funding requirement was only intended to encourage a trend toward community based treatment.

> ". . . the Committee has chosen to include a specific requirement that state programs plan for as much deinstitutionalization as is feasible, and earmark monies for this purpose . . . It is anticipated that these requirements will prompt *some movement* of patients from State institutions back into their communities." House Rep. No. 94-58, *supra*, p. 10, *reprinted in* 2 [1975] U.S. Code Cong. and Ad. News 919, 928. (emphasis added)

Significantly, the requirement that the states earmark funds for deinstitutionalization was deleted by the 1978 amendments which now require that states devote sixty-five percent of the funds received under the Act to any one of four

specified priority areas of service, one of which is community based services. 42 U.S.C. §6063(b)(4)(A) (1979 Supp.), P.L. 95-602, 92 Stat. 3010. See generally House Rep. No. 95-1188, *supra*, p. 2, 10, *reprinted in* 6 [1978] U.S. Code Cong. and Ad. News 7355, 7356, 7364.

The Court below reached its conclusion by recognizing a Congressional *preference* for deinstitutionalization; that "until 1978" state plans were required to contain a plan for the elimination of inappropriate placements in institutions and to "support the establishment of community programs as alternatives". 612 F.2d at 104. The Court further cites the remarks of Congressmen Carter and Biaggi which indicate a preference for deinstitutionalalization. From these expressions of *preferences* for deinstitutionalization, the Third Circuit found a right to treatment in the least restrictive manner. 612 F.2d at 104, 105.

As pointed out by the dissenting opinion, an implied cause of action requires the breach of a statutory duty. The Court below elevated a preference for least restrictive treatment into a mandatory duty, without statutory authority to do so.

> "The duty of the states under the Act is to provide alternative individual habilitation to the extent feasible, which includes a wide variety of fiscal concerns. Yet the impact of the approach taken by the majority is exactly the opposite: it imposes a duty to provide less restrictive treatment, regardless of cost or available funds . . . It is improper to say an implied cause of action exists and then impose new substantive duties nowhere present in the statute in question." *Halderman v. Pennhurst*, 612 F.2d at 119 (dissenting opinion).

It should also be noted that the Third Circuit, in finding a preference for disinstitutionalization, relied in large part on

statutory provisions that had been repealed by the 1978 amendments, effective one and one-half years before its recent decision. As discussed *supra*, the states must now devote the majority of its effort under the Act in any one of four areas of priority, one of which is community services. 42 U.S.C. §6063(b)(4)(B)(i).

Furthermore, well established rules of construction have developed concerning co-operative federal grant programs wherein Courts have consistently refused to require states to provide all services that are authorized or appropriate, but, instead, have recognized the states' rights to tailor their plans according to fiscal requirements and local preferences as long as the state plans met those requirements mandated by federal law. *Beal v. Doe*, 432 U.S. 438 (1977); *Quern v. Mandley*, 436 U.S. 725 (1978); *Roe v. Norton*, 522 F.2d 928 (2nd Cir.), *on remand, 408 F.Supp. 660 (D.Conn. 1975) (3-judge Court), rev'd sub nom Maher v. Roe*, 432 U.S. 464 (1977).

Finally, the minimal federal finding belies federal intent to require that the states always provide treatment in the least restrictive alternative in this "co-operative" federal grant program. See, *Quern v. Madley*, *supra*, p. 745, 746.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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